A

DATO' SRI MOHD NAJIB HJ ABD RAZAK v. PP

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[CRIMINAL APPLICATION NO: WA-44-290-11-2019]
13 JANUARY 2020

B

CRIMINAL LAW: *Charges – Criminal charges – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges relating to offences under Penal Code, Malaysian Anti-Corruption Commission Act 2009 and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Application for supply of statements by potential witnesses upon calling of defence – Whether requests in application could be acceded to*

C

CRIMINAL PROCEDURE: *Disclosure of information – Statements and documents – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges – Application for disclosure of identities of witnesses not called by prosecution whose statements were recorded by Malaysian Anti-Corruption Commission and their statements – Criminal Procedure Code, s. 51*

D

The applicant ('accused'), former Prime Minister of Malaysia, was charged with seven charges relating to offences committed under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 ('MACCA') and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFAPUA'). Before the hearing of the defence for the charges, the accused filed the present application, seeking (i) the identities of the witnesses not called by the prosecution whose statements had been recorded by the Malaysian Anti-Corruption Commission ('MACC'); and (ii) the supply of those statements as the accused may specify. In support of his application, the accused submitted that (i) the investigating officer ('PW57') testified that the MACC had recorded statements from 193 persons; (ii) a number of persons from whom statements were recorded had either passed away or could not be traced; (iii) there were a number of named persons from whom statements were not recorded; (iv) at the close of the prosecution case, the prosecution offered a list of 66 potential witnesses to the defence. Out of this number, only 41 of the named persons were witnesses which provided statements to the MACC while the remaining 25 were officers of the MACC; (v) in actual fact, 97 persons – whose identities had been withheld – who had given statements to the MACC in the course of the investigations ('other witnesses') who had not been called as witnesses, who were not being offered for cross-examination or made available to the defence; and (vii) it was 97 because there were 193 persons whose statements were recorded less 55 who were called as prosecution witnesses and other than 41 who were listed as offered.

E

F

G

H

I

Held (dismissing application):

(1) The requests in the accused's application could not be acceded to. The accused could not ask for any particular witness to be offered or for the list of witnesses to be supplied to the defence. It is the bounden duty of the prosecution to call all necessary witnesses who are essential to the unfolding of the narrative of the case of the prosecution in order to establish a *prima facie* case at the end of the prosecution case. However, there is no legal duty on the prosecution, upon a ruling that the prosecution had established a *prima facie* case, to offer or supply to the accused a full list of witnesses from whom statements have been recorded by the investigation agency under the relevant laws. Once this court at the close of the prosecution case ruled that the prosecution had proved a *prima facie* case and did not in that ruling hold that the prosecution had failed to call any particular witness, it was not open for the accused to ask for any particular witness to be called or for the full witness list to be supplied. Furthermore, in the same prosecution against the accused, an earlier application for a list of witnesses and for statements from all potential witnesses had been refused by this court. The dismissal was affirmed by the Court of Appeal. (paras 24 & 27-29)

(2) What the accused applied for – the disclosure and supply of witness statements taken by the MACC at the defence stage – was not specifically authorised under any law but was otherwise a matter that fell under s. 51 of the Criminal Procedure Code, requiring the fulfilment of the test of necessity and desirability, which were not satisfied. However, case law authorities, namely the apex courts in *Husdi v. PP*, *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* and *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* now govern the process and had ruled against such disclosure and supply on grounds of statements recorded from potential witnesses, in the course of investigation, to be privileged for policy considerations such as to avoid witness-tampering and by reason of the statement to be made in official confidence which disclosure could be detrimental to public interest. By the doctrine of *stare decisis*, the High Court must follow the binding precedent created by the Federal Court. (paras 71, 72 & 76)

Case(s) referred to:

Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 5 CLJ 23 CA ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 5 CLJ 93 HC ***(refd)***
Dato' Sri Mohd Najib Hj Abd Razak v. PP [2019] 1 LNS 434 FC ***(refd)***
Husdi v. PP [1980] 1 LNS 29 FC ***(refd)***
Husdi v. PP [1979] 1 LNS 33 HC ***(refd)***
Jamaludin Md Kassim v. PP [2010] 9 CLJ 377 CA ***(refd)***

A *Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC* ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
Ng Tiam Kok & Yang Lain lwn. PP [2013] 1 CLJ 632 CA ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
B *R v. Brown (Winston) [1998] AC 367* ***(refd)***
R v. Lawson (1990) 90 Cr App R 107 ***(refd)***
R v. Stinchcombe [1991] 3 SCR 326 ***(refd)***
R v. Ward [1993] 2 All ER 578 ***(refd)***
Siti Aisyah v. PP [2019] 7 CLJ 27 CA ***(refd)***
Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC ***(refd)***
C *Teh Lee Tong v. Rex [1951] 1 LNS 96 HC* ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 5, 51, 51A, 112, 113(2)
Evidence Act 1950, ss. 32(1), 124, 145
D Malaysian Anti-Corruption Commissions Act 2009, ss. 6, 7, 30(3), (8), 62
Securities Commission Malaysia Act 1993, s. 134

Other source(s) referred to:
Archbold's Pleadings, Evidence and Practice in Criminal Case, 44th edn, 1992, para 4-276

E *For the applicant - Muhammad Shafee Abdullah, Harvinderjit Singh, Farhan Read, Wan Aizuddin Wan Mohammed, Syahirah Hanapiah & Zahria Eleena Redza; M/s Shafee & Co*
For the respondant - Tommy Thomas, Sithambaram Vairavan, Suhaimi Ibrahim, Ishak Mohd Yusoff, Donald Joseph Franklin, Muhammad Saifuddin Hashim Musaimi, Budiman Lutfi Mohamed & Mohd Ashrof Adrin Kamarul; SFCs
F
Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali J:

G **Introduction**

[1] This is an application by the accused, upon this court calling for his defence, primarily for the prosecution to supply all or any statements recorded by the MACC as may be determined by the defence in respect of those who have neither been called as prosecution witnesses nor offered to
H the defence.

I

[2] At the conclusion of the hearing, I decided to decline the same and highlighted the principal reasons for the dismissal. This judgment contains the full reasons for my decision.

Key Background Facts

[3] The accused was charged with seven criminal charges concerning offences under the Penal Code (three charges), the Malaysian Anti-Corruption Commissions Act ("MACC Act") (a single charge) and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("the AMLATFAPUAA") (three charges).

[4] On 11 November 2019, this court delivered its decision to call the accused to enter his defence in respect of all seven charges at the end of the prosecution case after this court heard the testimonies of 57 witnesses over a period of 57 days.

[5] Before the date fixed for this court to hear the defence of the accused who had chosen to give sworn testimony, the defence filed the instant application, by way of a notice of motion seeking for the identities of witnesses not called by the prosecution whose statements have been recorded by MACC, and for the accused be supplied with those statements as the accused may specify. The application thus also revolves around the obligations of the prosecution and rights of the defence *vis-à-vis* witnesses who have provided statements to the investigating authorities but who were not called during the prosecution stage.

[6] The orders sought for in the motion are *inter alia* as follows:

(i) An order that the prosecution do forthwith and in any event not later than 24 hours from the date of this order deliver to the solicitors acting for the Applicant a list with the names, details, designations and contact information all persons from whom information, records of examinations, written statements on oath and/or affirmations have been obtained and/or recorded by the Malaysian Anti-Corruption Commission ("MACC") and/or any other investigation agency ("List") in relation to the investigations which have culminated into the subject matter of the present proceedings (WA-452-07/2018, WA-45-3-07/2018 and WA-45-5-08/2018) ("Investigations");

(2) An order that the Prosecution elect and justify whether the persons listed in the List are either being offered to the defence to be cross-examined or are being made available to the defence to call as defence witnesses if the defence so decides, save for witnesses who have already testified during the prosecution case and/or persons which the Investigating Officer (PW57) has testified are untraceable, dead and/or cannot be found;

A

(3) An order that the Prosecution do forthwith and in any event not later than 24 hours from the date of this order deliver to the solicitors acting for the Applicant all records of examinations, written statements on oath and/or affirmations ("Statements") obtained and/or recorded by the MACC and/or any other investigation agency from the persons which the Investigating

B

Officer (PW57) has testified are untraceable, dead and/or cannot be found;

(4) An order that upon the defence providing the Prosecution with the names of persons on the List which the defence has elected to cross-examine and/or call as a defence witness (as the case may be),

C

the Prosecution shall forthwith and in any event no later than 24 hours therefrom, provide the defence with Statements obtained and/or recorded by the MACC and/or any other investigation agency from the said persons and/or any one or more of the said person as this Honourable Court deems fit;

D

(5) That the continuation of the trial in the present proceedings (WA-45-2-07/2018, WA-45-3-07/2018 and WA-45-5-08/2018) and commencement of the case for the defence be adjourned to date to be fixed by this Honourable Court to enable the defence to review the Statements delivered pursuant to the orders above and/or undertake any other action necessary to effectively prepare for the

E

defence case;

(6) Any other or further directions on other matters as will promote a fair and expeditious trial; and

(7) Any other and/or other order, relief or direction which this Honourable Court may deem fit and proper in the circumstances.

F

[7] The defence highlighted that the investigating officer (PW57) has testified that first, there were a total of 193 persons from whom statements had been recorded by the MACC. Secondly, there were a number of persons from whom statements were recorded but which have since either passed away or become untraceable. Thirdly, there were a number of named

G

persons from whom statements were not recorded. Fourthly, out of the 56 witnesses called by the prosecution, statements were not recorded from PW52 and PW56.

[8] At the close of the prosecution case on 27 September 2017 the prosecution provided a list of 66 potential witnesses who were offered to the

H

defence. Out of this, only 41 of the named persons are witnesses which have provided statements to MACC, whilst the balance 25 named persons are officers of the MACC.

I

[9] The defence therefore argues that there are in actual fact 97 persons who had given statements to the MACC in the course of the investigations ("other witnesses") who have not been called as witnesses, who are not being offered for cross-examination or made available to the defence, all of whom whose identities are being withheld. It is 97 because there were 193 whose statements were recorded less 55 who were called as prosecution witnesses and other than 41 who were listed as offered.

[10] The prosecution, as the respondent, resists this application.

Analysis And Evaluation By This Court

Crux Of Application

[11] The application of the accused herein is essentially to achieve two-key objectives. First is to require the prosecution to disclose the identities and details of others from whom statements have been recorded by MACC under the MACC Act but not offered to the defence; and secondly, for the prosecution to supply to the defence the statements recorded from those whom the defence may thereafter identify to call as defence witnesses.

Identities And Details Of Other Witnesses

[12] In respect of the first, which is covered by the first two prayers in the motion stated earlier, the principal contention of the defence is that the prosecution must under the law furnish to the defence the identities and details of other witnesses as the prosecution is duty bound to offer them to be cross-examined and that in any event, the prosecution must make all the other witnesses available to the defence in order for the defence to consider whether to call them as defence witnesses. It is thus the position of the defence that the list provided by the prosecution on 27 August 2019 does not fulfill its duty under the law.

[13] The case for the disclosure and supply of such information is anchored by the defence on two main grounds. First, the position of the defence is that under common law the prosecution is under a duty to offer all other persons from whom statements had been recorded for cross-examination and in any event obliged to make these persons ("the other witnesses") available to the defence for the latter to consider calling any of them as witness for the accused.

[14] The following case-law authorities have been referred to in support of its contention. In the case of *Teh Lee Tong v. Rex* [1951] 1 LNS 96; [1956] 1 MLJ 194 Spenser Wilkinson J summarised the position in the following terms:

A I think the result of the above remarks combined with the two decisions referred to may be summarised in this way:

(1) All the witnesses from whom statements have been taken should be brought to the Court by the prosecution, except those whose evidence will clearly and obviously throw no light on the case; any witness not so
B brought to Court must be made available to the accused, should he desire to call him.

(2) Having brought the witnesses to Court the prosecuting officer is not bound to call or to offer for cross-examination a witness whose evidence is in his opinion unnecessary or is obviously hostile.

C (3) The existence of witnesses brought to Court but not called or offered for cross-examination under (2) above must be brought to the attention of the Court so that they are available to be called by the defence, or by the Court should the Court consider this necessary.

It must be borne in mind, however, that the fact that the prosecution has
D taken statements from witnesses and has subpoenaed them may place the accused in an awkward position if suddenly faced with the offer of a witness, whose statement he has never seen. This difficulty could probably be met in most cases by supplying to the accused a copy of the statements of the witnesses not called by the prosecution. Where this course appears undesirable or for any other reason has not been followed
E the Court would no doubt in a proper case grant an adjournment to enable the accused to take statements from such witnesses.

[15] I do not however think that this judicial pronouncement, made prior to the independence of the nation can be said to accurately represent the law presently governing the subject now in dispute before me. Related to this, the
F accused also says that the Supreme Court in the leading case of *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433 held that the prosecution must provide a justifiable explanation for not offering the other witnesses for cross-examination and in any event must make the same available to the defence.

[16] I do not think, again, that this attribution to this important principle
G in *Ti Chuee Hiang* is accurate. *Ti Chuee Hiang* is the authority for the proposition that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has the duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution case to establish proof against the accused beyond all reasonable
H doubt. And at the very least, the prosecution must make them available for cross-examination by the defence, such that if the prosecution failed to fulfill this duty, the accused must be acquitted. In other words, the duty is in respect of material witnesses only, or those essential to unfold the narrative of the case of the prosecution.

I

[17] It is crystal clear therefore that not every witness or whoever the investigating agencies have recorded statements from must be offered to the defence.

[18] Further, the accused asserts that the Federal Court in *Jamaludin Md Kassim v. PP* [2010] 9 CLJ 377; [2011] 2 MLJ 717 also had occasion to refine the application of *Ti Chue Hiang*, where the duty of the prosecution to either offer the other witnesses for cross-examination or make them available to the defence was affirmed.

[19] I have to disagree yet again. For the Federal Court in *Jamaludin Md Kassim* clearly reasoned that *Ti Chuee Hiang* had ruled it was the obligation of the prosecution to call and examine the witness in question as he came within that category of witnesses who were essential to the unfolding of the prosecution case. That principle was held not to be applicable to the facts of *Jamaludin bin Md Kassim* because that witness was not a material witness and the absence of his testimony did not create a serious gap in the prosecution's case, such that the failure of the prosecution to offer him to be cross-examined before the close of the prosecution case was not fatal.

[20] The position of the prosecution is that all the 66 witnesses are made available to the defence after the prosecution closed its case. The prosecution offered these witnesses to be called as defence witnesses and they were not offered for cross-examination by the defence.

[21] The second line of argument of the defence is that the Criminal Procedure Code ("the CPC") contains no special provision on the procedure concerning the prosecution's duty *vis-à-vis* such other witnesses. As such, according to the defence, s. 5 of the CPC is to be invoked resulting in the applicability of the law in force in England relating to the pertinent criminal procedure. Section 5 states as follows:

> **5. Laws of England, when applicable**
>
> As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force the law relating to criminal procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto.

[22] It is the submission of the defence that the governing English criminal procedure is that where the prosecution has taken a statement from a person whom they know can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence. This principle, as stated in *Archbold's Pleadings, Evidence and*

Practice in Criminal Case, 44th edn, 1992) para 4-276, was applied in the English Court of Appeal decision in *R v. Ward* [1993] 2 All ER 578, and affirmed by the House of Lords in *R v. Brown (Winston)* [1998] AC 367.

[23] Most significantly, the defence asserts that the Court of Appeal in *Siti Aisyah v. PP* [2019] 7 CLJ 27; [2019] 4 MLJ 46 has very recently affirmed the procedures outlined in the abovementioned English authorities as being the law in this country by the invocation of s. 5 of the CPC.

[24] In my view, it is already well-established in the criminal justice system in this country that it is the bounden duty of the prosecution to call all necessary witnesses who are essential to the unfolding of the narrative of the case of the prosecution in order to establish a *prima facie* case at the end of the prosecution case. There is no legal duty on the prosecution upon a ruling that the prosecution has established a *prima facie* case for the prosecution to offer or supply to the accused a full list of the witnesses from whom statements have been recorded by the investigation agency under the relevant laws.

[25] No less than the Federal Court had ruled in *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19 that the law on this point is that where the prosecution has established its case, there is no further obligation to call a particular person as a witness or to offer him to the accused. The authority for this important proposition is the High Court decision in *Public Prosecutor v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705 which analysed the issue in the following passages of the judgment which I have quoted *in extenso*:

> The prosecution led evidence to show that Yee Chin Koon cannot be traced. Learned counsel for the accused contended that even if it was not possible for the prosecution to have called him as a witness at least the statement made by him to the police under s. 112 of the Criminal Procedure Code ought to have been adduced in evidence as he is a material witness. Failure to do so, he submitted, would warrant an adverse inference to be drawn against the prosecution pursuant to s. 114(g) of the Evidence Act 1950 ('s. 114(g)'). *It is well settled that in a criminal case prosecuting counsel, provided there is no wrong motive, has a discretion as to whether or not to call any particular witness and in particular has a discretion not to call in support of his case a witness whom he does not believe to be a witness of truth (see Khoon Chye Hin v. PP [1961] MLJ 105). But there is an obligation on the prosecution to call as witnesses persons whose evidence is essential to unfold the narrative upon which its case is based (see Seneviratne v. R [1936] 3 All ER 36).* Thus as Abdul Hamid CJ (Malaya) (as he then was) said in *Teoh Hoe Chye v. PP* [1987] 1 MLJ 220 at p 229:

> Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (*Abdullah Zawawi v. PP* [1985] 2 MLJ 16). Insofar as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi's* case).

Thus the question to be asked in each case is whether the prosecution has proved its case even without calling some other witnesses who are available. An adverse inference cannot be drawn for failure to call a witness when the prosecution has discharged its burden (see *Namasiyiam & Ors v. PP* [1987] 2 MLJ 336; *Kadir bin Awang v. PP* [1989] 2 MLJ 33; *Jazuli bin Mohsin v. PP* [1990] 2 MLJ 190; *Lim Young Sien v. PP* [1994] 2 SLR 257). As Yong Pung How CJ said in *Chua Keem Long v. PP* [1996] 1 SLR 510 at pp 523-524:

> The appellant's contention was that the failure of the prosecution to adduce the evidence of those other gamblers meant that the court could presume that the evidence would have gone against the prosecution that is that there were no such visits.
>
> Such arguments are commonly made. Commonly too, such arguments are without merit. *The court must hesitate to draw any such presumption unless the witness not produced is essential to the prosecution's case.* Any criminal transaction may be observed by a number of witnesses. It is not necessary for the prosecution to produce every single one of those witnesses. All the prosecution need to do is to produce witnesses whose evidence can be believed so as to establish the case beyond a reasonable doubt. Out of a number of witnesses, it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all of the rest should be called, nor why any presumption should be drawn that the evidence of those witnesses not produced would have been against the prosecution.

In such circumstances it is also not necessary for the prosecution to offer or make available the remaining witnesses to the defence. As Yong Pung How CJ said in *Satli bin Masot v. PP* [1999] 2 SLR 637 at p 649:

> We were of the view that when s. 116 illustration (g) (our s. 114(g)) is sought to be invoked on account of the prosecution's failure to offer particular witnesses to the defence, the rule should be no different from a case where the contention is that the prosecution has failed to call particular witnesses. In both cases, whether an

A adverse inference should be drawn should depend on the materiality of the witness not called/offered and whether the failure to do so constitutes a withholding of evidence from the court or the accused. On our facts, just as there was no basis for drawing an adverse inference against the prosecution on account of their failure to call the two named CNB officers as witnesses, we were of the view that there was similarly no basis for drawing an adverse inference against the prosecution on account of their failure to offer the two officers to the defence.

This principle has been recognised by our Federal Court in *Mansor bin Mohd Rashid*'s case and the Court of Appeal in *Lee Lee Chong v. PP* [1998] 4 MLJ 697 where it was held, on the facts of the cases, that the failure by the prosecution to call witnesses or to make them available to the defence at the close of its case was not fatal at that stage. I pause to add that the prosecution cannot, in an attempt to prevent an adverse inference being drawn, offer material witnesses to the defence without calling them to testify if, to do so, would result in there remaining gaps in its case. In this regard I refer to *Abdullah Zawawi v. PP* [1985] 2 MLJ 16 where Salleh Abas LP said at pp 18-19:

> But where the prosecution evidence falls short of proving a *prima facie* case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution case.

Thus cases such as *Samsudin v. PP* [1962] MLJ 405 and *PP v. Chee Kon Fatt* [1991] 3 CLJ 2564 which enunciate that an adverse inference cannot be drawn against the prosecution if witnesses are offered to the defence must be read with caution. *Where the evidence of a witness is material he must be called to testify. Offering him to the defence, in such circumstances, will not prevent an adverse inference being drawn. What, however, is critical is that where the prosecution has proved its case it is no part of its function to call witnesses in order to discharge the evidential burden on the accused* (see *Seneviratne*'s case; *PP v. Dato' Seri Anwar bin Ibrahim (No 3)*). In this case I have found that the prosecution has made out a *prima facie* case against the accused. This means that the prosecution has led sufficient evidence to unfold the narrative of its case. Thus its failure to call Yee Chin Koon as a witness or make him available to the defence is not fatal at this stage. Needless to say, if he is a material witness then, in the absence of him being traced, there would be a burden on the prosecution to tender his statement recorded under s. 112 of the Criminal Procedure Code as evidence under s. 32(1)(i) of the Evidence Act 1950.

Be that as it may, the failure by the prosecution to call Yee Chin Koon as a witness or, alternatively, to have tendered his police statement in evidence is a perilous course to be adopted. I say this because the prosecution is expected to negative in its case in chief the explanations that the defence could be expected to advance in answer to the allegations against it (see *Evidence: Proof and Practice by Graham Roberts* (1st Ed) p376). It is the case for the defence as suggested to PW4 and PW6 in their cross-examination that the bag was held by Yee Chin Koon; that the motorcycle was knocked into from behind; that the accused wore the yellow helmet at the material time and that he did not throw the white bag. These suggestions were categorically denied by PW4 and PW6 and thus cannot be considered as evidence at this stage of the trial as I said in an earlier part of the judgment. Therefore the suggestions put to the prosecution witnesses by the defence do not play any part in determining the materiality of Yee Chin Koon at this stage of the trial. However, it would have been prudent for the prosecution to adduce such evidence in the course of its case as is reasonably available to it to rebut the defences suggested because the legal burden on the prosecution does not end once it has made out a *prima facie* case. The burden of proof on the prosecution is governed by s. 182A of the Criminal Procedure Code which reads as follows:

…

This is a re-statement of the common law position as formulated in the celebrated case of *Woolmington v. DPP* [1935] AC 462 where Lord Sarkey LC said at pp 481-482:

…

Thus where the prosecution has made out a prima facie case and the accused, in his defence, offers an explanation, the burden of proof to establish the offence beyond reasonable doubt is still on the prosecution and if, upon a review of the evidence on both sides, there is a reasonable doubt, the accused must be acquitted. This may arise if, on the facts of this case, the matters suggested to PW4 and PW6 in their cross-examination have been crystallised into evidence by the defence in its case. In order to ensure that its case has been proved beyond reasonable doubt at the end of the defence case the prosecution must negative the defences raised. As *Cross on Evidence* (7th Ed) says at p 145:

> Once the party who bears the evidential burden has discharged it by adducing evidence sufficient to justify consideration of a particular issue, it becomes necessary for the party bearing the legal burden on that issue, the proponent, to persuade the trier of fact that it should be decided in his favour.

A As the prosecution has failed to negate the suggestions made by the defence in the course of its case it may still rebut the defence advanced by cross-examination of the accused and his witnesses and/or, if possible, by calling Yee Chin Koon as a witness or tendering his police statement in evidence by re-opening its case at the end of the case for the defence. In seeking to adduce such rebuttal evidence the prosecution will be B confronted with a problem as the general rule is that the prosecution must present its primary case completely before closing its case. This will include negating the case for the defence as suggested to its witnesses in cross-examination. A failure to observe this rule will result in the prosecution being precluded from adducing evidence in rebuttal on the ground that it would amount to the prosecution splitting its case. However, there is C a discretion to allow evidence in rebuttal in very special or exceptional circumstances (see *Shaw v. The Queen* (1952) 85 CLR 365). This was lucidly explained by Wells J in *R v. Killick* (1980) 24 SASR 137 at pp 152-154:

…

D On the facts of this case the prosecution may find it difficult to adduce the evidence in rebuttal of Yee Chin Koon as it had been in its possession from the very beginning and as it had already been put to the prosecution witnesses by the defence. This means that the prosecution was already aware of the defences to be raised. It cannot be said that the suggested defences were of minimal, doubtful or marginal value at that stage and E having assumed probative force when the defence was presented warrant evidence in rebuttal to be allowed. When the defences were suggested they struck at the very core of the prosecution case thereby negating the argument that they were of minimal, doubtful or marginal value at that stage. It may therefore be argued that the prosecution ought to have adduced the evidence in the course of its case and not by way of rebuttal. F The inability of the prosecution to bring on record the evidence of Yee Chin Koon at the close of the defence case, if deemed necessary, may therefore attract s. 114(g) against it even at that stage. In this regard *Law of Evidence* (16th Ed) Vol I by Woodroffe & Amir Ali says at p 395:

> G Presumptions of fact are not necessarily taken up at the beginning of the consideration of a case or of any particular part of it. They are really assumptions of fact which may be made at any stage of a case.

The presumption arising under s. 114(g) is one of fact. It can therefore be raised at the end of the whole case. This is logical as the legal burden to prove the case is on the prosecution till the conclusion of the case. It is H at the conclusion of the trial that the court will consider all the evidence adduced before it and decide whether the prosecution has proved its case beyond reasonable doubt. This exercise will necessarily entail a consideration of whether the defences advanced, where reasonable, have been negated by the prosecution. This can only be done by an evaluation

I

of the evidence of witnesses who have been called by the prosecution and evidence which could have been adduced but was not. The exercise may reveal that the evidence of a witness not called, though not material at the close of the case for the prosecution, has turned out to be crucial in the light of the defence presented. The absence of the evidence of that witness on record at that stage may lead to the inference that if he had been called to testify by the prosecution in the course of its case his testimony would have been unfavourable within the meaning of s. 114(g). It cannot be argued that the burden would be on the accused to call Yee Chin Koon as a witness. There is no duty upon an accused to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other (see *Goh Ah Yew v. PP* [1949] MLJ 150; *Abu Bakar v. R* [1963] MLJ 288; *Tan Foo Su v. PP* [1967] 2 MLJ 19). It is not the duty of the defence to fill in any gap in the prosecution case. The position is different where a presumption has been invoked thereby placing an onus on the accused to prove certain facts. Where there is such a burden on an accused the onus is on him to prove the facts and failure to call a material witness to establish the facts may result in an adverse inference being drawn against him (see *Baharom v. PP* [1960] MLJ 249; *PP v. Dato' Seri Anwar bin Ibrahim (No 3)*). This, of course, is not the position in this case. The materiality of Yee Chin Koon therefore remains to be seen in the light of the defence to be advanced. (emphasis added)

[26] To the same effect, the Court of Appeal in *Ng Tiam Kok & Yang Lain lwn. PP* [2013] 1 CLJ 632; [2013] 1 MLJ 342, in the judgment written by Ahmad Maarop JCA (later PCA) stated instructively thus:

[40] Jadi, persoalan yang penting dalam kes ini ialah sama ada pihak pendakwaan telah membuktikan kesnya tanpa memanggil Afrizal dan Guntur memberikan keterangan. Jika pihak pendakwaan telah membuktikan kesnya tanpa memanggil dua orang saksi tersebut, adverse inference di bawah s. 114(g) Akta Keterangan 1950 tidak boleh dipakai terhadap pihak pendakwaan. Dalam keadaan yang sedemikian itu adalah juga tidak perlu bagi pihak pendakwaan menawarkan mereka atau make them available kepada pihak pembelaan. Hal ini dijelaskan oleh Augustine Paul H (kemudian HMP) dalam *Public Prosecutor v. Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 di ms 673-674:

…

[41] Dalam pengamatan kami, berdasarkan kepada keterangan pihak pendakwaan yang telah kami huraikan di bahagian lain penghakiman ini, pihak pendakwaan telahpun membuktikan kes *prima facie* terhadap Ng, Ispangat dan Sia. Tidak terdapat gap dalam kes pihak pendakwaan. Adverse inference di bawah s. 114(g) Akta Keterangan 1950 tidak boleh ditimbulkan terhadap mereka. YA Hakim bicara telah membuat keputusan yang betul apabila beliau memerintahkan Ng, Ispangat dan Sia membela diri.

[27] As such, I am constrained to incline to agree with the submission of the prosecution that once this court at the close of the prosecution case ruled that the prosecution had proved a *prima facie* case and did not in that ruling hold that the prosecution had failed to call any particular witness, it is not open for the accused to ask for any particular witness to be called or for the full witness list to be supplied. Taking cognizant also, of the law as I have just stated, there is no valid basis to contend that there is an absence of any legal rules governing the issue so as to justify the invocation of s. 5 of the CPC.

[28] The requests as contained in prayers 1 and 2 of this application cannot therefore be acceded to by this court. The accused, as the applicant herein cannot therefore ask for any particular witness be offered or for the list of witnesses be supplied to the defence.

[29] I should also add that the other reason why this application of the full list of the witnesses cannot succeed is this. In this same prosecution against the accused, an earlier application for a list of witnesses and for statements from all potential witnesses had been refused by this court (see *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 5 CLJ 93). This dismissal was affirmed by the Court of Appeal (see *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 5 CLJ 23) and the Federal Court (see *Dato' Sri Mohd Najib bin Hj Abd Razak v. Pendakwa Raya* [2019] 1 LNS 434; [2019] MLJU 00282). This I will mention more of in respect of the other application by the accused – for the supply of statements recorded from the other witnesses.

Statement Of Other Witnesses

[30] The other key aspect of this application, as contained in the third and fourth prayers of the notice of motion is the request for the witness statements of those identified by the prosecution to be given to the defence.

[31] The applicant makes heavy reliance on the recent Court of Appeal decision in *Siti Aisyah v. PP* [2019] 7 CLJ 27; [2019] 4 MLJ 46 which among others examined the question on the entitlement of the defence, at the defence stage to the statements of those who are not called by the prosecution. *Siti Aisyah*, as stated by the applicant, made the following important pronouncements:

(i) There is a common law duty on the prosecution to disclose to the defence the statements recorded under s. 112 of the CPC of witnesses who ought to be offered by the prosecution or made available to the defence;

(ii) The s. 112 statements are not privileged;

(iii) The fruits of the investigations in the possession of the Crown are not property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done (see the Supreme Court decision in *R v. Stinchcombe* [1991] 3 SCR 326);

(iv) The applicable criminal procedure in England which provides for disclosure of the statements recorded from witnesses not called by the prosecution (*R v. Ward*, *R v. Lawson* (1990) 90 Cr App R 107, *R v. Brown (Winston)*) is applicable in Malaysia by virtue of s. 5 of the CPC;

(v) The other Commonwealth jurisdictions namely England, Australia, Hong Kong, Canada, India and Brunei have all recognised a common law duty on the prosecution to disclose unused material to the defence;

(vi) Disclosure of the statements from witnesses not called by the prosecution for preparation of the defence case would promote equality of arms, and would be a greater appreciation of a person's constitutional right to a fair trial including being provided with every opportunity to substantiate a person's defence;

(vii) With regards to the statements of witnesses who have since become unavailable, these statements should to be disclosed to enable the defence to consider adducing the same under s. 32(1) of the Evidence Act 1950;

(viii) Given that the stage in which disclosure is sought is at the defence case, there is no risk of witness tampering as the other witnesses have to be offered to the defence in any event;

(ix) These statements are not protected from disclosure by virtue of s. 124 of the Evidence Act 1950 because these statements are not made in 'confidence' but are in fact recorded through coercive process of the law;

(x) Disclosure of the statements would also avoid the witnesses varying their evidence due *inter alia* to inability to recollect events which occurred some time ago and risk impeachment. A right to merely interview these witnesses would not assist in this regard;

(xi) Public interest leans in favour of disclosure of the statements as it is in the interest of promoting a fair and effective administration of justice; and

(xii) As such, it would also be necessary and desirable to order a s. 51 of the CPC disclosure of the statements of these other witnesses including those who have now become unavailable.

[32] I do not doubt that *Siti Aisyah* appears to evince a welcomed shift in judicial attitude which reflects the promotion of greater disclosure to the defence, and which disclosure may even represent an integral facet of an accused's constitutional right to a fair trial.

Binding Apex Court Authorities

[33] However, the one complete answer to the applicant's overarching submissions which are premised on the Court of Appeal decision in *Siti Aisyah* is that I am bound by the decisions of the Federal Court which in my view have earlier dealt with the issues now brought before me in the instant application. The decisions in these cases, namely *Husdi v. PP* [1980] 1 LNS 29; [1980] 2 MLJ 80, *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312, and even more directly *Dato' Sri Mohd Najib Hj Abd Razak v. Pendakwa Raya* [2019] MLJU 00282 mean that the law applicable to a s. 112 CPC statement that it is an absolutely privileged document also extends to the s. 30(8) MACC Act statements (the subject matter of the instant application before me) as matters concerning public policy, privileged documents and witness tampering are relevant to investigation under the Penal Code, MACC Act and AMLATFAPUAA.

Statements Are Privileged

[34] These cases of high authority represent the present law on disclosure of witness statements and witness list. As such, any statement recorded under s. 30(8) of the MACC Act is a privileged document and not subject to disclosure.

[35] At the High Court in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 5 CLJ 93 I had dismissed the application for a pre-trial disclosure of witness list and witness statements by the same applicant herein, stating, among others, the following propositions:

> [83] The law governing the supply of such statements to an accused before trial, as stated in *Husdi v. PP* [1980] 1 LNS 33; [1979] 2 MLJ 304 is free from ambiguity. An accused is not entitled to copies of police statements recorded from witnesses in the course of investigations. First, a statement taken from a witness is a privileged document. Secondly as a matter of public policy, it is not desirable for the prosecution to provide the accused with such statements as there is a real danger of tampering with witnesses.

[84] In that case, the accused applied for copies of the cautioned statement made by the accused and of statements made by prosecution witnesses during investigations. Syed Othman FJ, sitting in the High Court, allowed a copy of the cautioned statement to be supplied to the accused but not the statements of prosecution witnesses, holding that there might be tampering of witnesses.

…

[86] The Federal Court, in the judgment of Suffian LP in *Husdi v. PP* [1980] 1 LNS 29; [1980] 2 MLJ 80, affirmed this decision which also primarily ruled that during trial, the accused is entitled to a copy of the statement by a prosecution witness for purposes of impeachment.

…

[88] Thus the key request of the applicant herein for copies of the statements made by other persons to the MACC cannot be sustained. The application absolutely fails the test of necessity and desirability in s. 51 of the CPC.

Public Policy Against Witness Tampering

[36] In the same case, I also dealt with the issue of public policy against witness tampering as a basis stated in *Husdi v. PP* to deny disclosure, in the following terms:

[103] Now the applicant seeks to be supplied with statements and documents which are not taken from the applicant. In other words, the applicant is seeking to inspect statements and documents procured and obtained by the MACC in the course of investigation which the prosecution does not intend to tender to prove the charges against the applicant. These are the unused documents of the prosecution.

…

[113] The risk of witness tampering or intimidation aside, potential witnesses may also be reluctant to come forward to give statement to the authorities if the assurance of confidentiality is compromised. There may also be repercussions which are prejudicial to other possible investigations against the same accused.

[114] I do appreciate the argument of the applicant that witnesses are compelled under the relevant provisions of the MACC Act and AMLATFA to appear before the investigating officers to have their statements recorded. It is not like in the context of s. 112 where there is no specific law making non-attendance itself an offence.

A

[115] For example, it is noted that under s. 30(10) of the MACC Act, contravention of s. 30 which includes a failure to attend upon being notified to appear to give a statement is an offence punishable with jail terms upon conviction under s. 69 of the same Act. A similar provision exists in s. 32(8) of the AMLATFA which makes such failure or refusal an offence.

B

[116] However the point about threat of witness tampering is in my view still relevant as it is legitimate. One who has given statements against the accused would naturally not want his statement be given to the accused, especially before trial even starts for obvious reasons. If the accused gets to know of the details divulged by certain witnesses against the accused, there is every reason to suspect that the accused would prefer the witness not to repeat such statement in court if called as a witness. Surely, public policy should protect against the risk of tampering in such not unlikely circumstances.

C

[117] The fact that the statements are taken by the MACC and not the police does not change the position in law. Matters concerning public policy, privileged documents and witness tampering are similarly relevant even if investigations are under a different legislation such as MACC Act and AMLATFA. In that sense, these considerations are essentially immutable in this context.

D

Official Confidence Under Evidence Act 1950

E

[37] In addition, I had also in that same case held that disclosure of witness statements taken under the MACC Act ought to be refused because the statements fall under the category of official confidence under s. 124 of the Evidence Act 1950, if public interest would suffer by reason of the disclosure, applying the decision of the Federal Court in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19. This was what I said:

F

[118] Furthermore, there is basis to contend that the investigators of the MACC are considered as public officers under s. 6(2) of the MACC Act, thus attracting the application of s. 124 of the Evidence Act 1950 which means that communication made to officers of MACC in official confidence cannot be compelled to be disclosed if they consider that public interest would suffer by such disclosure (see also the Federal Court decision in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733).

G

[38] I thus concluded that the only circumstance when the defence may be given access to statements of prosecution witnesses, is when the defence seeks to impeach the credit of a witness, during trial under s. 145 of the Evidence Act 1950. This decision in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 5 CLJ 93 was affirmed by the Court of Appeal and the Federal Court.

H

I

[39] The Court of Appeal in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 5 CLJ 23 had the occasion to say this on such statements being privileged, subject to public policy against witness tampering and falling under the official confidence category under s. 124 of the Evidence Act 1950:

> [47] The application is also for statements given by potential witness to the MACC and other documents obtained by the MACC under the relevant provisions compelling production embodied in the MACC Act 2009 and AMLATFA 2001 in the course of investigation pertaining to the charges against the appellant. It is trite that an accused person is not entitled to copies of police statements recorded from witnesses recorded in the course of investigations. *Firstly, such statement is a privileged document (see Methuram Dass v. Jagannath Dath ILR 28 Cal 794) and secondly, as a matter of public policy, it is undesirable for the prosecution to supply the defence with the police statements as there is a danger of tampering with witnesses (Refer to Husdi v. PP [1980] 1 LNS 29; [1980] 2 MLJ 80). This fails the test of desirability and necessity in s. 51A of the CPC.*
>
> [48] It has been submitted by the appellant that the respondent's affidavits did not aver on any reluctance or possible reluctance by any potential witnesses. Neither is there any averments by the respondent in any of the affidavits which alleged any repercussions to other possible investigations or even the existence of any other pending investigations against the appellant. It is also to be noted that the powers of the investigators under the MACC Act 2009 and AMLATFA 2001 clearly compel witnesses to provide statements to the MACC Act 2009 and the penal consequences of non-attendance. On this, we refer to what was said by the Federal Court in *Husdi v. PP* [1980] 1 LNS 29; [1980] MLJ 80 at p. 82:
>
> > We do not think that the prosecution should supply copies of the police statement direct to the defence without the intervention of the court- because of the peculiar circumstances prevailing in this country. Malaysia is a small country, with a small population, and Malaysians are easily scared; they are reluctant to be involved. If a crime is committed under their nose they look the other way, see, hear and say nothing, do little or nothing to help identify - let alone - arrest an offender, and yet complain that the police do not catch criminals and that courts are bedazzled by technicalities. If the prosecution is obliged to supply copies of police statements to the defence without the intervention of the court, the defence may be tempted to ask for, and the prosecution will be obliged to supply copies of every statement in the police investigation file, and Malaysians will be more reluctant to come forward with evidence to incriminate their fellows.

A Thus, regardless of the absence of any averments by the respondent in the affidavits as to the possibility of witness tampering, the risk is substantive and real.

[49] *Further, it is not in the public interest if statements taken from witnesses and documents obtained during the course of police investigations be furnished to the* B *appellant. Section 124 of the Evidence Act 1950 provides that a public officer cannot be compelled to disclose communications made to him in official confidence if he considers that public interest would suffer by such disclosure. This will also include communications made to MACC officers in their official confidence (See s. 6(2) of the MACCA 2009). Providing the appellant with the documents sought for in the prayers which were made in official confidence to the MACC would prejudice further* C *investigations relating to other cases involving the appellant (See Suruhanjaya Sekuriti v. Datuk Ishak Ismail).*

[50] The learned trial judge based his findings on the *ratio* in the case of Federal Court case of *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* which held that the provision of s. 134(4) of the SCA must be read subject to the rules D of privilege and prohibition on grounds of public policy.

[51] *The learned trial judge held that the statements of witnesses made to MACC officers are privileged documents under s. 124 of the Evidence Act 1950. Therefore, it is his findings that as investigators are public officers under s. 6(2) of the MACCA thus attracting s. 124 of the Evidence Act 1950 which means communications made to such officers of MACC in official confidence cannot be compelled to be disclosed.* E

[52] It is the prerogative of the prosecution as to how to prove their case and it is not for the court to anticipate as to how the prosecution is to proceed with the conduct of proving the charge against the appellant.

[53] The application in this case is not for documents which are specified in the charge which is against the accused. Therefore, to allow the F appellant to go beyond these particulars would be to provide the accused with knowledge of the means by which the prosecution proposed to prove the alleged facts. That is not what s. 51A envisaged. *Syed Abu Bakar Ahmad v. PP* [1981] 1 LNS 127 is a case which illustrates this point. The accused applied for an order to inspect and make copies of all documents G in the possession of the prosecution. The accused contended that he would be gravely impaired in preparing his defence without giving him an opportunity to have sight of the documents. His application was dismissed by Seah J, who was of the view that s. 51 of the CPC should be construed strictly and it does not allow an accused to ask for discovery of documents or inspection of documents seized by the police in the course of their H investigation or in their possession before the criminal trial because to do so would mean an inspection of the evidence of the prosecution by the defence prior to the trial. Therefore, save for the documents as provided under s. 51A of the CPC, the defence is not entitled to ask for the disclosure or inspection of documents/materials in the possession of the prosecution before the commencement of the trial.

I

[54] It is submitted by the respondent in the submission before us that the application by the appellant does amount to a fishing expedition, thus the generality of the documents applied for. This has been specifically addressed by the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* where the Federal Court said that:

> [47] The appellant cannot say at this stage that his defence is going to be so and so and that he needs to have access to such and such documents and materials to prepare for his defence. One settled principle attached to the application for discovery under s. 51 CPC is that, at this pre-trial stage, a roving and fishing inquiry for evidence is not permissible. A catch all net cannot be cast. The appellant is not entitled to know by what means the prosecution proposes to prove the facts underlying the charge he faces. This remains the prerogative of the prosecution.

Conclusion

[55] Therefore, based on the aforesaid, the appellant is not entitled to be supplied with the documents stipulated in paras. (1)(g), (h), (i), (j) and 2(i) in the notice of motion.

[56] *We find that the learned trial judge did not err in his findings that the applicant has failed to establish a case for delivery of the information and documents applied for.* We unanimously dismissed the appeal by the appellant and affirmed the decision of the learned High Court Judge. (emphasis added)

[40] Thus, the Court of Appeal accepted that witness statements ought not to be disclosed on grounds of the statements being privileged, of public policy against risk of witness tampering and of the statements having been given in official confidence that ought to be protected under s. 124 of the Evidence Act 1950.

Apex Court Authorities Make No Distinction On Stage Of Proceedings

[41] I am not unmindful of the fact that the contention of the applicant is that these case authorities do not specifically deal with the situation of the disclosure of witness statements at the stage of at the end of the prosecution case when defence is called. The most recent Federal Court case of *Dato' Sri Mohd Najib Hj Abd Razak v. Pendakwa Raya* [2019] MLJU 00282 too was in respect of an application for a pre-trial disclosure.

[42] And the applicant maintains that the Court of Appeal decision in *Siti Aisyah* held that witness statements are not privileged, departing from *Husdi*, because, among others, and as stated earlier, witness statements, since *Husdi*, could now be ordered to be produced either under s. 113(2) of the CPC for impeachment or where circumstances under s. 32 Evidence Act 1950 so justify. This is thus a manifestation that the present law does no longer deem witness statements to be absolutely privileged from disclosure.

[43] In addition, it is argued that there is no issue of tampering of witnesses since at this stage of witnesses being offered to the defence, tampering cannot arise as the witness is bound to not depart from the statement or risk impeachment. Further unlike the situation in *Anwar Ibrahim* which is a pre-trial s. 51 disclosure, the instant case is a defence stage s. 51 disclosure. The disclosure of the witness statements at the defence stage in contrast is desirable and necessary to provide the accused with the ability to fortify and substantiate his defence.

[44] In my view however, the propositions concerning the privileged nature of witness statements, the issue of it being against public policy for disclosure be made given the risks of witness tampering as well as that such statements are to be protected as they could also be said to fall within statements made in official confidence under the Evidence Act 1950 are judicial pronouncements in these authorities which are applicable irrespective of the stage of proceedings.

[45] And this is quite apart from the plain fact that these cases too do not draw any distinction as to whether these important propositions that have long governed the disclosure rules on witness statements ought to be made to apply differently depending on the stage of the proceedings. The only question raised previously whether disclosure of documents generally is made before or after commencement of trial. But this has no application to witness statements which position is quite settled, given these cases, that they are privileged throughout, before and during the entire trial proceedings, and to be protected for public policy reason and given its status as having been made in official confidence under the Evidence Act 1950.

[46] It is difficult to accept the contention of the applicant that the Federal Court does not in *Husdi* hold that the s. 112 statements were privileged, and that in *Dato' Sri Mohd Najib* did not affirm the decision of the High Court or the Court of Appeal on the point of the statements being privileged.

[47] The High Court in *Husdi v. PP* [1979] 1 LNS 33 decided in no uncertain terms that:

> These two cases involve actions for defamation. But I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to inspect. Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses.

[48] The Federal Court, in the judgment of Suffian LP in *Husdi v. PP* [1980] 1 LNS 29; [1980] 2 MLJ 80 held:

> We do not think that the prosecution should supply copies of the police statement direct to the defence without the intervention of the court – because of the peculiar circumstances prevailing in this country. Malaysia is a small country, with a small population, and Malaysians are easily scared; they are reluctant to be involved. If a crime is committed under their nose they look the other way, see, hear and say nothing, do little or nothing to help identify – let alone – arrest the offender, and yet complain that the police do not catch criminals and that courts are bedazzled by technicalities. If the prosecution is obliged to supply copies of police statements to the defence without the intervention of the court, the defence may be tempted to ask for, and the prosecution will be obliged to supply, copies of every statement in the police investigation file, and Malaysians will be more reluctant to come forward with evidence to incriminate their fellows.
>
> To sum up, the answer to the two questions as limited during the course of arguments is this – when a prosecution witness is being cross-examined, and the defence proposes to impeach his credit, the court, should, on the request of the defence, refer to his police statement and may then, if the court thinks it expedient in the interest of justice, direct the defence to be supplied with a copy.
>
> Our conclusion is not inconsistent with judgment of Syed Othman FJ in *Husdi v. Public Prosecutor* [1979] 2 MLJ 304 out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses, and which he answered in the negative, which answer was not challenged before us.

[49] Plainly, given that the issue of privileged witness statement as decided by Syed Othman FJ in the High Court was not challenged, it was consequently upheld by the Federal Court.

[50] And in *Dato Sri Mohd Najib*, the Federal Court did affirm the decisions of the Court of Appeal and the High Court which had applied *Husdi* and found that the witness statements were privileged. For the avoidance of doubt these are the penultimate and concluding paragraphs in the judgment of the Federal Court:

> [22] The granting of the order sought by the appellant will effectively mean that the entire Investigation Papers have to be delivered to the appellant as all witness statements and documents obtained by the Investigation Officer under section 30(9) of the MACCA and section 40 of AMLATFAPUA Act 613 are obtained pursuant to *non-obstante* clause statements and documents. The submission if accepted has a far reaching

A consequences for in the future the entire Investigation Papers have to be delivered to the defence for all cases under these laws. We agree entirely with the Court of Appeal and the High Court that although section 51A of the Code is a step towards the equality in arms principle, any further development must await future legislative intervention.

B [23] Having considered the submissions made by learned counsel for the appellant and Senior Deputy Public Prosecutor on behalf of the prosecution, and for the reasons earlier discussed, the conclusion which emerges is that both the High Court and the Court of Appeal did not err in law and fact when they held that the appellant had failed to establish his case for the delivery of information and documents applied for in C paragraphs 1(g), (h), (i), (j) and 2(b)(i) of the Notice of Motion. Accordingly, we dismiss the appeal and affirm the decisions of the High Court and the Court of Appeal.

[51] It is also in any event an established principle of law that once a document is privileged, it remains privileged and the privilege can only be D waived by the prosecution (see the Federal Court decision in *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ 14).

[52] There is also the counter argument advanced by the respondent that even though a witness whose statement has been recorded by the MACC is E called by the defence, tampering or intimidation of that witness could well occur at the defence stage, especially made easier with the witness statement in the hands of the defence. Thus it is argued that tampering could occur by persuading (even bribing or blackmailing) the witness to change his testimony such that it could then be alleged that the witness has now F contradicted the prosecution's own case and that there was thus wilful suppression of evidence during the prosecution case. I do not think that these concerns are without merit. But I consider them to be of no relevance to witnesses who have since passed away or become untraceable.

[53] In addition, as a matter of public policy, apart from the real danger G of tampering with witnesses, there may be reluctance on the part of potential witnesses to come forward to give statement to the authorities such as the MACC if the assurance of confidentiality is compromised, as averred by the investigating officer in his affidavit to oppose the application now before me (more on this later). It cannot not be taken seriously that the supply of the H witness statement to any accused could even potentially consequent harm on the witness or his family or property, which is also a substantive public policy consideration that cannot be emphasised enough.

I

[54] In any event, it is always open for the witness in question to seek to have his memory from his witness statement refreshed without having to furnish his witness statement to the defence and risks tampering and other concerns related thereto, as discussed earlier. And, the risk of witness tampering or intimidation aside, other potential witnesses may also be reluctant to come forward to give statement to the authorities in the future if the assurance of confidentiality is compromised. There may also be repercussions which are prejudicial to other possible investigations against the same accused.

[55] There is thus the argument that the interest of justice is well-balanced in that not only will the prosecution witnesses be protected but that the accused is also given the opportunity to mount an effective defence by calling the witnesses offered who could be allowed to refresh his memory, if necessary, *vis-vis* the statements recorded earlier in the presence of the investigating officer.

[56] I have also made the following observation in *Dato' Sri Mohd Najib*:

> [116] However the point about threat of witness tampering is in my view still relevant as it is legitimate. One who has given statements against the accused would naturally not want his statement be given to the accused, especially before trial even starts for obvious reasons. If the accused gets to know of the details divulged by certain witnesses against the accused, there is every reason to suspect that the accused would prefer the witness not to repeat such statement in Court if called as a witness. Surely public policy should protect against the risk of tampering in such not unlikely circumstances.

[57] The Court of Appeal in *Siti Aisyah* observed that the leading case on the subject matter is *Suruhanjaya Sekuriti* where the Federal Court recognised that statements recorded under s. 134 of Securities Commission Malaysia Act 1993 are protected from disclosure under s. 124 of the Evidence Act 1950. The latter reads thus:

> **124. Official communications**
>
> No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure:
>
> Provided that the court may require the head of the department of the officer to certify in writing whether or not such disclosure would be detrimental to the public interest and, if the head of the department certifies that such disclosure would not be prejudicial to the public interest, then the officer shall disclose the communications.

[58] Nevertheless, even though the Court of Appeal in *Siti Aisyah* stated that *Suruhanjaya Sekuriti* was a civil case, the High Court in *Dato' Sri Mohd Najib* affirmed the decision of the High Court where I held:

> [21] The crux of the Federal Court decision in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* may be said to be encapsulated in the following passage of the judgment of Ahmad Maarop CJ (Malaya) (as he then was):
>
> > [32] In other words, the provision under section 134(4) of the SCA must be read subject to the rules of privilege and prohibition on the grounds of public policy. In our view, this applies to civil as well as criminal proceedings. In the context of the present appeal, the relevant and applicable rules for consideration are housed in sections 123 and 124 of the Evidence Act 1950.
>
> [22] Thus even though s. 134(4) makes all such statements taken in the course of investigation to be admissible regardless, the Federal Court read into that s. 134(4) the qualification that such admissibility must be subject to ss. 123 and 124 of the Evidence Act 1950 which according to the Federal Court, were held to codify the rules of the law of privilege and public policy against disclosure of investigation statements.

[59] The Court of Appeal in *Dato' Sri Mohd Najib* approvingly stated the following:

> [49] Further, it is not in the public interest if statements taken from witnesses and documents obtained during the course of police investigations be furnished to the appellant. Section 124 of the Evidence Act 1950 provides that a public officer cannot be compelled to disclose communications made to him in official confidence if he considers that public interest would suffer by such disclosure. This will also include communications made to MACC officers in their official confidence (See s. 6(2) of the MACCA 2009). Providing the appellant with the documents sought for in the prayers which were made in official confidence to the MACC would prejudice further investigation relating to other cases involving the appellant (See *Suruhanjaya Sekuriti v. Datuk Ishak Ismail*).
>
> [50] The learned trial judge based his findings on the *ratio* in the case of Federal Court case of *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* which held that the provision of s. 134(4) of the SCA must be read subject to the rules of privilege and prohibition on grounds of public policy.
>
> [51] The learned trial held that the statements of witnesses made to MACC officers are privileged documents under s. 124 of the Evidence Act 1950. Therefore, it is his findings that as investigators are public officers under s. 6(2) of the MACCA thus attracting s. 124 of the Evidence Act 1950 which means communications made to such officers of MACC in official confidence cannot be compelled to be disclosed.
>
> …

> [56] We find that the learned trial judge **did not err in his findings that the applicant has failed to establish a case for delivery of the information and documents applied for.** We unanimously dismissed the appeal by the appellant and affirmed the decision of the learned High Court Judge.
>
> (emphasis added)

[60] Further, it is for the public officer in question to aver that the communication documented in the statements recorded by the authorities is confidential as it was given in official confidence. In *Suruhanjaya Sekuriti,* Ahmad Maarop FCJ stated the following:

> [48] Reverting to the present appeal, the issue we have to consider is whether the privilege under s. 124 of the Evidence Act 1950 is applicable? Applying the law which we have just set out, in considering this pivotal issue, the court would have first to determine whether the communication in question had been made to a public officer in official confidence. If the answer is in the negative, then the s. 134 statements will have to be disclosed. If the answer is in the affirmative, then it is for the officer concern to decide whether the statements should be disclosed or not? From the affidavit filed by Mohd Rizal Mohamad @ Harun, an investigation officer of the appellant in opposing the respondent's application for discovery, it is revealed that in June 2010, the appellant commenced investigation into suspected offences committed under the securities law in respect of Kenmark. Mohd Rizal was appointed as the investigation officer of the said investigation. Under s. 144 of the SCA, Mohd Rizal, while discharging his duties as an officer of the appellant, shall be deemed to be a public servant within the meaning of the Penal Code, and more importantly, a public officer for the purpose of the Evidence Act 1950. So, the element of public officer under s. 124 of the Evidence has been established. According to Mohd Rizal, as an investigation officer appointed under s. 125 of the SCA, he is empowered to carry out investigation of any offence under the securities law which include the CMSA. Under s. 134 of the SCA, if an investigation officer carrying out an investigation under securities law, suspects or believes on reasonable grounds that any person can give information relevant to a matter which he is investigating, the investigation officer may require such person to appear before an investigation officer of the appellant to be examined orally in which case the investigation officer shall reduce into writing any statement made by such person. The CMSA also provides the appellant with powers to institute either civil or criminal proceedings or both, against a person suspected to be committing any offence under the securities law. According to Mohd Rizal, the appellant's investigations are crucial to the fulfilment of the appellant's statutory duties to prevent and investigate breaches of the securities laws by instituting civil or criminal proceedings or both, against persons suspected of violating the securities laws. According to Mohd Rizal, for this purpose all the documents, and particularly the s. 134 statements can be utilised by the appellant in civil

A or criminal proceedings or both. Full discovery of those documents in this case, would gravely prejudice the appellant's conduct of subsequent proceeding against him. Furthermore, the respondent has yet to be examined orally by the appellant pursuant to s. 134 of the SCA. The s. 134 statements sought by the respondent are actually statements given by 38 other persons interviewed by the appellant in the course of the
B Kenmark investigations. According to Mohd Rizal, those 38 persons came in and provided the information which was recorded in their statements to the appellant on the basis that the statements were confidential. On the affidavit given, it is clear to us that the s. 134 statements of the 38 persons were communication made by each of them to the investigation officer of the appellant in the course of their official duties as public
C officers under the SCA, and that the communications by the 38 persons were made to them in official confidence. Mohd Rizal deposed that if the s. 134 statements were ordered to be disclosed, future witnesses will not give their information to the appellant with the assurance that their statement will be confidential. This, according to him will greatly prejudice the appellant's ability to carry out its future investigations into offences
D under the securities law, not just into Kenmark, but into any other company. In other words, public interest would suffer by the disclosure of the s. 134 statements. **As we have decided that the communications were made in official confidence, it is for the officer to determine whether public interests would suffer by the disclosure of the s. 134 statements.**
E He had determined that it would. We will not interfere. Thus, the Court of Appeal erred in ordering the disclosure of the s. 134 statements pursuant to the respondent's application in encl. 38. What we have decided thus far is sufficient to dispose of the present appeal. In the circumstances we find it unnecessary to answer the question of law on which leave to appeal was granted. (emphasis added)

F **[61]** And based on averments in the affidavit affirmed by the investigating officer (PW57), the said statements should be protected from disclosure under s. 124 Evidence Act 1950 because they were made in official confidence, and public interest would suffer by the disclosure of the witness statements. In his affidavit affirmed on 14 November 2019, the investigating
G officer averred that he is a public officer by virtue of s. 6 of the MACC Act and empowered to investigate under s. 7, including to order any person to attend before him to have his statement recorded under s. 30(3) and 30(8) of the same Act. This renders the written statements to form part of the investigation, and that they are privileged as being official communication
H made in official confidence to a public officer of the MACC.

[62] The investigating officer further averred that disclosure of such statements recorded from these potential witnesses would be detrimental to public interest because first, they were made by these persons to MACC in the honest belief that they would be kept confidential and not furnished to

I

the accused; secondly, such disclosure to the accused would amount to a betrayal of trust, and thirdly, such supply of the statements recorded from these potential witnesses to the accused would have the effect of deterring witnesses from coming forward to give such confidential information to MACC in the future. This would in turn prejudice the investigative abilities of the MACC and undermine the due administration of justice in this country.

[63] On the basis of the Federal Court decision in *Suruhanjaya Sekuriti*, I do not think it can now be said of the statements from the other witnesses in the instant case other than that these statements were also given in official confidence to a public officer and that further, based on the affidavit of the investigating officer, public interest would suffer should disclosure to the accused be compelled, I should add, either before or at any time during trial.

[64] It is irrelevant that the applicant argued that in his previous application at the pre-trial stage which was not successful, the investigating officer did not attempt to justify non-disclosure on the grounds now stated in his affidavit challenging this instant application.

Necessity For Legislative Intervention

[65] Acceding to this instant request would as such be a considerable departure from the law presently in force. Matters on disclosure of documents before and during trial have in any event always been governed by statute, as is more than amply shown by the various case law authorities.

[66] The law in this country has developed to promote as far as possible the attainment of the principle of equality of arms in criminal trials in our justice system. Section 51 for a long time and later considerably supplemented by s. 51A of the CPC continue to be the mainstay on the rules on disclosure in criminal procedure, and s. 62 of the MACC Act also represents a relatively recent and further development in this respect.

[67] I set out these statutory provisions for completeness.

51. Summons to produce document or other things (CPC)

(1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.

A (2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the provisions of any
B law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

51A. Delivery of certain documents (CPC)

(1) The prosecution shall before the commencement of the trial deliver to
C the accused the following documents:

(a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;

(b) a copy of any document which would be tendered as part of
D the evidence for the prosecution; and

(c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.

(2) Notwithstanding paragraph (c), the prosecution may not supply any
E fact favourable to the accused if its supply would be contrary to public interest.

(3) A document shall not be inadmissible in evidence merely because of non-compliance with subsection (1).

F (4) The Court may exclude any document delivered after the commencement of the trial if it is shown that such delivery was so done deliberately and in bad faith.

(5) Where a document is delivered to the accused after the commencement of the trial, the Court shall allow the accused:

G (a) a reasonable time to examine the document; and

(b) to recall or re-summon and examine any witness in relation to the document.

62. Defence statement (MACC Act)

H Once delivery of documents by the prosecution pursuant to section 51A of the Criminal Procedure Code has taken place, the accused shall, before commencement of the trial, deliver the following documents to the prosecution:

I

(a) a defence statement setting out in general terms the nature of the defence and the matters on which the accused takes issue with the prosecution, with reasons; and

(b) a copy of any document which would be tendered as part of the evidence for the defence.

Whether Test Of Desirability And Necessity Satisfied

[68] I have expressed the view in *Dato' Sri Mohd Najib* (HC) that any significant change in the law governing our criminal justice system should be legislated by Parliament, as it had previously undertaken in the enactment of ss. 51 and 51A of the CPC and s. 62 of the MACC Act. It cannot be emphasised enough that the supply of unused materials, including witness statements (of witnesses not called by the prosecution) to the accused will undoubtedly be a major change in the law. I said:

[121] However, in my judgment, any significant change in the law governing our criminal justice system should only be effected by express legislative amendments. Despite the fundamental change as asserted by the applicant on the position of the issue of ready admissibility of such statements and documents, as said to have been introduced by the MACC Act and the AMLATFA, these same pieces of legislation fall short of enacting of any provisions to also permit let alone compel the production of such documents.

[69] The Federal Court in the same case, on appeal from the Court of Appeal ruled thus:

[22] … The submission if accepted has a far reaching consequences for in the future the entire Investigation Papers have to be delivered to the defence for all cases under these laws. We agree entirely with the Court of Appeal and the High Court that although section 51A of the Code is a step towards the equality in arms principle, any further development must await future legislative intervention.

[70] It may also be arguable as to whether there is lacuna in our law on the admissibility of privileged documents to justify s. 5 of the CPC be invoked since this subject appears for all intents and purposes to be governed by ss. 51 and 51A of the CPC.

Whether Test Of Desirability And Necessity Satisfied

[71] What the applicant now applies for – the disclosure and supply of witness statements taken by the MACC to the accused at the defence stage is not specifically authorised under any law and but is otherwise a matter that falls under s. 51 of the CPC requiring the fulfillment of the test of necessity and desirability.

[72] Case law authorities however, principally *Husdi*, *Suruhanjaya Sekuriti* and *Dato' Sri Mohd Najib* as stated earlier now govern the process and have ruled against such disclosure and supply on grounds of the statements recorded from potential witnesses in the course of investigation to be privileged, for policy considerations such as to avoid witness tampering and by reason of the statements to be made in official confidence which disclosure could be detrimental to public interest. With no difference in judicial treatment on those reasons before the commencement or at any stage of the trial.

[73] And this leads me to one other reason why this application cannot succeed. It is this. Even if I were to follow the decision of the Court of Appeal in *Siti Aisyah* (which I cannot, by reason of the doctrine of binding precedent as I have stated above) I find that the test of desirability and necessity under s. 51 of the CPC upon which this application is premised, in respect of the statements recorded from the witnesses already offered, is not satisfied.

[74] This is because, unlike the application in *Siti Aisyah*, where the accused in that case requested for statements recorded from only the specifically identified seven out of 93 witnesses offered to the accused, the applicant before me has neither identified the specific witnesses whose statements he requires nor, unlike in *Siti Aisyah,* even indicate what roles were played by these witnesses, as well as the relevance of their intended evidence to the case. As such, in this context, the application appears more like a fishing expedition.

Binding Precedent

[75] The Court of Appeal in *Siti Aisyah* has further progressed the development of the equality of arms principle in this country and departed from the long-established position in *Husdi*, by drawing the distinction that the disclosure should be allowed at the defence stage, for the above-stated reasons which I certainly find to be not without strong merits. But I am in no position to not follow the binding decisions of the apex court especially in *Husdi*, *Suruhanjaya Sekuriti* and *Dato' Sri Mohd Najib*.

[76] And I hardly need mention that by the doctrine of *stare decisis*, this High Court must follow the binding precedent created by these later decisions of the Federal Court. In this respect, the following observations of the Federal Court in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; [2012] 3 MLJ 149, a case referred to by the applicant, are worthy of emphasis:

> [29] We are a country governed by the rule of law and thus finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment …
>
> [50] A precedent can be defined as a judicial decision which serves as a rule for future determinations in similar or analogous cases. A precedent or authority is a legal case establishing a principle or rule that a court or other judicial body adopts when deciding in subsequent cases with similar issues or facts. A precedent that must be applied or followed is known as a binding precedent. I would think that this court must follow its own proclamations of law made earlier on other cases and honour these rulings. After all, this court is the highest court in the country. The doctrine of precedent, a fundamental principle of English law, is a form of reasoning and decision-making formed by case law. Precedents not only have persuasive authority but also must be followed when similar circumstances arise. Any principle announced by a higher court must be followed in later cases. In short the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also obliged to obey the set-up precedents established by prior decisions. This legal principle is called *stare decisis*. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of *stare decisis*, ie, to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law.

(see also the Federal Court decision in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113).

Official Secrets

[77] The respondent also raised the argument that the statements from those not called as witnesses cannot be disclosed as the investigation papers – which includes the contents – have been designated as "official secrets" under the Official Secrets Act 1972. Given my decision as set out above, I find it unnecessary to address this point.

Application To Adjourn

[78] The one final substantive prayer in this application is that the start of the defence stage be adjourned and not begin on 3 December 2019 as scheduled in order to afford more time for the accused to adequately and effectively prepare for the defence case in these proceedings.

[79] However, considering the background on the start and the progress of the trial and the directions given well in advance, as pronounced in open court, on the key dates such as for the decision at the end of the prosecution case, and the start of the defence case, I am of the view that more than ample notice and reasonable time have been given to the applicant to prepare and re-strategize the relevant arrangement. The request for adjournment in my view cannot therefore be sustained.

Conclusion

[80] In view of the foregoing reasons, it is my judgment that the entirety of the prayers in the notice of motion cannot be acceded to, such that the application is therefore dismissed.